FILED
JUN 23 1994
OFFICE OF THE CLERK

No. 93-1850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHoPP COMPUTER CORPORATION, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA and
PAINEWEBBER INCORPORATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN D. GIFFIN
Counsel of Record

PETER J. MORGAN III

KEESAL, YOUNG & LOGAN
A Professional Corporation

Four Embarcadero Center, Suite 1500
San Francisco, California 94111
(415) 398-6000

Attorneys for Respondent
PAINEWEBBER INCORPORATED

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

20 pp

QUESTIONS PRESENTED

1. Whether one creditor may defeat a prior legal levy of a competing creditor against a common debtor by initiating an action that seeks recognition of a constructive trust over the debtor's assets, and thereby subject the competing creditor to liability for conversion.

2. Whether a stakeholder has a duty to question the validity of a writ of execution lawfully issued by a federal district court and served on the stakeholder.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 6

REASONS FOR DENYING THE WRIT 7

I. Principles of federalism are not at issue as the District Court did not interfere with the jurisdiction of a State Court 7

II. PaineWebber had no right to refuse or question the authority of the District Court . . 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Federal Cases

Securities Exchange Commission v. Wencke
622 F.2d 1363 (9th Cir. 1980) 12

United States v. United Mine Workers
330 U.S. 258, 67 S.Ct. 677,
91 L.Ed. 884 (1947) 11

State Cases

Berger v. Superior Court
175 Cal. 719 (1917) 12

Kirby v. San Francisco Savings & Loan Society
95 Cal.App. 757 (1928) 12

Kronberg v. Milton J. Wershow Co.
238 Cal.App.2d 170 (1965) 9

Statutes and Rules

28 U.S.C. § 1332 3
28 U.S.C. § 1346(b), 267 *et seq.* 3
F.R.C.P. 65(d) 12

Other Authorities

43A C.J.S. §§ 251 (West 1978 Ed.) 12

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

CHoPP COMPUTER CORPORATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
PAINEWEBBER INCORPORATED,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent PaineWebber Incorporated ("PaineWebber") respectfully prays that CHoPP Computer Corporation, Inc.'s ("CHoPP") Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 29, 1993, as to which the court of appeals denied CHoPP's petition for rehearing on February 16, 1994 be denied.

STATEMENT OF THE CASE

On or about August 25, 1986, the San Francisco Superior Court issued a preliminary injunction in a state court action entitled *CHoPP v. Laurins*, Case No. 862163 (the "state action"). On or about August 25, 1986, PaineWebber was given a copy of the preliminary injunction. Under the terms of the preliminary injunction, all *defendants* in the state action were enjoined from, among other things, withdrawing or transferring, directly or indirectly, any proceeds of any "short" sale of CHoPP stock. Neither the United States nor PaineWebber were defendants in Superior Court action.

On November 17, 1987 and January 29, 1988, two writs of execution were issued by the Federal District Court for the Northern District of California in the matter of *United States v. Laurins*, Case No. CR-87-0170-SAW (the "District Court action"). The November 17, 1987 writ was to collect a $250,000 fine and the January 29, 1988 writ was to collect the $444,000 judgment resulting from the District Court action.

Both writs of execution were subsequently served by the United States on PaineWebber in New York on or about February of 1988. The purpose of the writs was to levy on a brokerage account maintained by Laurins[1] at PaineWebber to satisfy the criminal fine and judgment entered by the District Court against Laurins. Because the account contained short sales positions, it was necessary for

---

[1]In the San Francisco Superior Court action, CHoPP alleged that Laurins and his co-defendants had taken part in a scheme to manipulate the market price of CHoPP Computer stock and thereby profited from illegal short-selling.

PaineWebber to purchase securities to reduce the equity in the account to cash. On March 29, 1988, the United States obtained a court order directing PaineWebber to liquidate the account to satisfy the writs of execution. Subsequently on April 26, 1988, PaineWebber remitted to the United States two checks totaling $694,000. PaineWebber liquidated the account to satisfy the writs of execution issued by the District Court.

On March 27, 1990, almost two years after the writs of execution were served, CHoPP submitted a claim for property damage (contingent upon CHoPP's obtaining a judgment against defendants in the Superior Court action) against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) and 28 U.S.C. § 1332. On August 2, 1990, the United States denied all of CHoPP's claims.

On January 22, 1991, CHoPP filed a complaint in the United States District Court for the Northern District of California against the United States and PaineWebber alleging conversion and violation of the preliminary injunction. On February 13, 1991, the United States and CHoPP filed Cross-Motions for Summary Judgment. Following a hearing and oral argument on March 15, 1991, the District Court granted the United States' Motion for Summary Judgment and denied CHoPP's Cross-Motion for Summary Judgment against the United States. On May 24, 1991, the District Court granted PaineWebber's Motion for Summary Judgment, filed on April 16, 1991, and denied CHoPP's Cross-Motion for Summary Judgment against PaineWebber and CHoPP's Motion for Reconsideration of the Cross-Motions for Summary Judgment between CHoPP

and the United States. Judgment on the District Court's ruling was entered on June 10, 1991.

The District Court held, (1) CHoPP had no claim for conversion because CHoPP had never actually possessed any of the money and no court had ruled that CHoPP was entitled to any of the funds at the time the United States received the $694,000 pursuant to the writs of execution; and (2) the United States and PaineWebber were not liable for violation of the preliminary injunction because the preliminary injunction was directed only against Defendants in the Superior Court action and PaineWebber and the United States were not named therein.

Petitioner appealed the final judgment to the United States Court of Appeals for the Ninth Circuit. On September 29, 1993, the Ninth Circuit affirmed the District Court's decision holding that the United States and PaineWebber were entitled to summary judgment. The Appellate Court held that Petitioner "has no viable claim against either defendant for conversion of funds or for violation of an injunction." *CHoPP Computer Corp. v. United States*, 5 F.3d 1344, 1351-1352 (9th Cir. 1993).

In upholding the District Court's ruling the Appellate Court concluded that Petitioner's "state court action was not one to determine ownership of the PaineWebber account, but rather one to establish Laurins' civil liability to CHoPP." (5 F.3d at 1349). The Ninth Circuit concluded that under California law Petitioner "did not hold equitable title to the PaineWebber account at the time of the levy." (5 F.3d at 1350). The Appellate Court concluded that PaineWebber was not liable for violating the

injunction because in transferring the funds it did not act as Laurins' agent.

On October 13, 1993 CHoPP filed a petition for rehearing and suggested a rehearing *en banc*. On February 16, 1994, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for a rehearing *en banc*.

SUMMARY OF THE ARGUMENT

CHoPP's argument attempts to mislead this Court into believing that there existed a conflict in the exercise of the respective powers of a federal court and a state court. The Superior Court's order was not intended to determine ownership of the account at PaineWebber, but rather to assist Petitioner in recovering damages which the jury might award in the future. The District Court, on the other hand, exercised its own jurisdiction to allow a judgment creditor to levy on assets belonging to a creditor. At the time the District Court issued the writs of execution, no court had ruled that CHoPP was entitled to any of the funds from the PaineWebber account. "Only the final state court judgment recognized the existence of a constructive trust, and it came too late for the purpose of defeating the earlier levy of the United States." (5 F.3d at 1348).

Furthermore, PaineWebber had no right to refuse or question the authority of the District Court. The Superior Court order was not directed at PaineWebber nor did PaineWebber act as Laurins' agent in releasing the funds to the United States. Failure to obey the District Court's order would have subjected PaineWebber to sanctions for contempt.

REASONS FOR DENYING THE WRIT

I.

PRINCIPLES OF FEDERALISM ARE NOT AT ISSUE AS THE DISTRICT COURT DID NOT INTERFERE WITH THE JURISDICTION OF A STATE COURT

Petitioner mischaracterizes the proceedings below as an "unseemly clash of a state court and a federal court" exercising conflicting powers. (Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, page 10; hereinafter "Petition at p. 10"). Petitioner's efforts at misdirection are obviously calculated to intrigue the Court into granting review. Petitioner's inaccurate characterizations to the contrary, the federal court did not "overrule" or "retroactively nullify" an order of the Superior Court. *Id.* The federal court simply exercised its own jurisdiction to allow a judgment creditor to levy on assets belonging to a creditor.

Petitioner's mischaracterization is premised on their claim that the federal and state courts exercised conflicting powers "to resolve the ownership and disposition of property." *Id.* Both the District Court and the Court of Appeals correctly recognized, however, that the state court order was issued to assist Petitioner in recovering damages which the jury might award in the future; not to determine ownership of the PaineWebber account. (5 F.3d at 1346, 1349). Both lower courts recognized that the subject of Petitioner's state court action was not the PaineWebber account, but rather an action to establish Laurins' civil liability to Petitioner. *Id.*

On the one hand, Petitioner states that "[i]t is important to note that CHoPP does not ask the Court to review any issue of California law on which the court below opined." (Petition at p. 10). On the other hand, Petitioner asks this Court to overrule the finding of the lower courts and find that under California law, Petitioner had an ownership interest in the PaineWebber account. It is only by overruling the lower courts' application of California law that this Court could find that the state and federal courts exercised conflicting powers to resolve issues of ownership.

Both lower courts held that Petitioner's claim against PaineWebber was not actionable because Petitioner did not own or possess the PaineWebber accounts at the time the writs of execution were served, or when the proceeds were distributed to the United States. (5 F.3d at 1346, 1351-1352) The District Court Order granting summary judgment for the United States stated:

> up to and including United State's April 1988 receipt of the $694,000: (a) CHoPP Computer never actually had possessed any of this money; and (b) no court had ruled that CHoPP Computer was entitled to any of this money. Thus, at least absent the October 1990 judgment, there is no viable conversion cause of action for CHoPP Computer against United States, even if United State's execution against the PaineWebber account was ineffective under California law.

(Petitioner's Appendix D, pp. 6-7.)

In finding that Petitioner never had a right to any funds in the PaineWebber account prior to the writs of execution being served on PaineWebber, the District Court recognized that under California law such title or possession must exist at the time of the alleged tortious act. *Kronberg v. Milton J. Wershow Co.*, 238 Cal.App.2d 170, 174-175 (1965). Id.

In affirming the District Court's decision, the Ninth Circuit held:

> The retroactive creation of a constructive trust is not necessarily a self-executing award of equitable title. There is no California law that suggests that CHoPP may rely upon a 1990 judgment to impede satisfaction in 1988 of a competing judgment that was already final. Nor did the preliminary injunction give CHoPP a prior claim. The preliminary injunction was not final, was not addressed to others than the parties, and did not purport to impose a trust on the *res* of the PaineWebber Account.

(5 F.3d at 1348) (Citations Omitted.)

The Ninth Circuit recognized the absurdity that would result if Petitioner's argument were accepted.

> If a retroactive creation of a constructive trust may defeat a prior and otherwise legal levy, one creditor may deter competitors from satisfying their judgments against a common debtor merely by initiating an action that

> seeks recognition of a constructive trust over the debtor's assets. A third party who proceeded with a levy under those circumstances could be held liable for a conversion.

Id. The Ninth Circuit concluded that California law would not sanction the disruption that Petitioner's position would cause if adopted. *Id.*

The Ninth Circuit correctly recognized that California law discourages the use of equitable remedies to ward off competing prior lienholders. (5 F.3d at 1349.) The Majority concluded that "[w]here, as here, the purpose of the constructive trust is only to secure payment of a debt, the plaintiff, like other creditors must rely upon prejudgment attachment procedures." (5 F.3d at 1349). Petitioner has failed to explain why it did not seek a prejudgment writ of attachment to protect its interests.

Since the PaineWebber account was not the subject of Petitioner's state court action, Petitioner's arguments are inapplicable. "Only the final state court judgment recognized the existence of a constructive trust, and it came too late for the purpose of defeating the earlier levy of the United States." (5 F.3d at 1348). Contrary to Petitioner's view, the state court and the federal court were not exercising their respective powers to determine the ownership of the PaineWebber account. Accordingly, this case does not involve any conflict between the authority of a state court and a federal court.

II.

PAINEWEBBER HAD NO RIGHT TO REFUSE OR QUESTION THE AUTHORITY OF THE DISTRICT COURT

In seeking to hold PaineWebber liable for obeying the District Court's orders, Petitioner's argument implicitly places a duty upon PaineWebber to review the validity of the federal court's order. This position is, of course, insupportable. "[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings . . . without regard even for the constitutionality of the Act under which the order is issued." *United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947).

Furthermore, since PaineWebber was not a named defendant in the Superior Court action, Petitioner could not prevent PaineWebber from honoring the writs of execution served on it by the United States for the stock or the stock proceeds. Because the final judgment in Petitioner's Superior Court action was not entered until October 26, 1990, PaineWebber properly remitted the $694,000 to United States on April 26, 1988 pursuant to the valid writs of execution and the District Court Order approximately 2-1/2 years before Petitioner acquired any vested right to the account proceeds.

In its order granting the United States' Motion for Summary Judgment, the District Court found that the preliminary injunction issued in the state court was directed only against "defendants" in the Superior Court action. It

is Hornbook law that an injunction is binding only upon the parties to an action, their officers, agents and employees and those persons in active concert or participation with them. (43A C.J.S. §§ 251 (West 1978 Ed.)). This limitation on the effect of an injunction is embraced by California law. *Berger v. Superior Court*, 175 Cal. 719, 721-722 (1917); *Kirby v. San Francisco Savings & Loan Society*, 95 Cal.App. 757, 759 (1928). This is also a basic limitation of federal practice. Federal Rules of Civil Procedure Section 65(d); *Securities Exchange Commission v. Wencke*, 622 F.2d 1363, 1368-1369 (9th Cir. 1980). The District Court rejected Petitioner's contention that the preliminary injunction issued by the Superior Court action somehow bound PaineWebber since PaineWebber and the United States were not parties in the Superior Court action.

In granting the United States' Motion for Summary Judgment, the District Court, held:

> The preliminary injunction allegedly violated by United States: (a) was issued in August 1986 in a San Francisco Superior Court action wherein CHoPP Computer, as plaintiff, asserted that Laurins and others -- not including United States or PaineWebber -- had engaged in illegal transactions involving CHoPP Computer stock; and (b) froze the PaineWebber account that contained the $694,000 later received by United States.
>
> The preliminary injunction was directed only against "defendants" in the Superior

> Court action. United States was neither a defendant therein nor an agent, an officer, or an employee of any such defendant. Furthermore, before receiving the $694,000, United States was not a successor-in-interest to any defendant in the Superior Court action. Thus, United State's receipt of the $694,000 did not violate the preliminary injunction.

(Petitioner's Appendix D, pp. 4-5.)

Though PaineWebber's obligations were not addressed in the order granting the United States' Motion for Summary Judgment, it is evident from the order granting PaineWebber's Motion for Summary Judgment that because PaineWebber was not a defendant in the Superior Court action, it could not be found in violation of the preliminary injunction for releasing the stock pursuant to the writs of execution and Court Order.

The only effect of the preliminary injunction was to prevent Laurins and other named defendants in the Superior Court action from "withdrawing or transferring, directly or indirectly, any proceeds of any 'short' sales of CHoPP stock." (5 F.3d at 1345.) In granting the United States' Motion for Summary Judgment, the District Court held that the preliminary injunction was directed only against defendants in the Superior Court action. (Petitioner's Appendix D, p. 5.)

The Ninth Circuit affirmed the District Court's decision, concluding that since PaineWebber was not bound by the state court injunction, it incurred no liability for

complying with the levy. (5 F.3d at 1351). The Ninth Circuit concluded that in releasing the funds, "PaineWebber acted on its own authority, and not as Laurins' agent." *Id.*

When the United States served upon PaineWebber the writs of execution, PaineWebber's agency for Laurins was terminated. Two of the conditions which terminate an agency are the extinction of the subject of the agency and the agent's renunciation of the agency. California Civil Code, Sections 2355(b) and (d). Thus, where the subject matter is seized on execution by a creditor of the principal, the subject matter is destroyed and the agency is terminated. Further, in liquidating and releasing the account proceeds pursuant to the writs of execution, PaineWebber was protecting its interests, not Laurins'. By acting on its own authority, against its client's interests, in order to comply with a valid levy issued by a competent court, PaineWebber renounced its agency for Laurins. Accordingly, PaineWebber was not bound as an agent by the injunction against Laurins and therefore incurred no liability for complying with the levy.

Furthermore, placed in context, Petitioner's view that PaineWebber had some duty to look beyond the federal court's order is even more unreasonable. On August 25, 1986, PaineWebber received notice of a state court injunction which did not name PaineWebber as a party. In February 1988 PaineWebber was served with an order from a federal court compelling it to turn over the account in question to the United States government. As PaineWebber was never a party to the state court action, it had no way of knowing what had happened in the interim. Not being named as a party to the injunction, PaineWebber

could not have known whether the injunction had been since lifted. The state court proceedings could have been long resolved. It is unreasonable to require PaineWebber to question a federal district court's order in such circumstances. Failure to obey the District Court's order would have subjected PaineWebber to contempt proceedings and severe sanctions.

Finally, Petitioner's allegation that PaineWebber "urged" the United States to obtain an order from the District Court directing PaineWebber to liquidate Laurins' position is false and without support in the record. (Petition at p.4). Petitioner's mischaracterization is one more example of its consistent effort to distort the facts and mislead the Court.

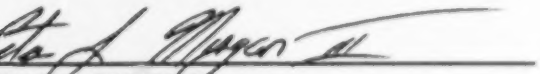
III.

CONCLUSION

In view of the foregoing, Respondent PaineWebber respectfully requests that the Supreme Court of the United States deny the Petition for a Writ of Certiorari.

DATED: June 23, 1994

Respectfully submitted,



JOHN D. GIFFIN
PETER J. MORGAN III
KEESAL, YOUNG & LOGAN
Attorneys for Defendant/Respondent
PAINEWEBBER INCORPORATED